

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2006-000335-001 DT

10/09/2007

HON. WENDY S. MORTON, JUDGE PRO TEM

CLERK OF THE COURT
S. Bindenagel
Deputy

ARTISTIC POOLS DECKS AND FALLS INC

KEITH S KNOCH

v.

ARIZONA STATE REGISTRAR OF
CONTRACTORS (001)
GREGORY CUMMINS (001)
BRANDY CUMMINS (001)

MONTGOMERY LEE
GREGORY CUMMINS
3500 N. EL DORADO AVE.
LAKE HAVASU CITY AZ 86406
BRANDY CUMMINS
3500 N. EL DORADO AVE.
LAKE HAVASU CITY AZ 86406

OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

RULING

Plaintiff Artistic Pools Decks and Falls, LLC (“Artistic”) appeals from a final decision by the Registrar of Contractors (“ROC”). This court has jurisdiction pursuant to the Administrative Review Act, A.R.S. §§ 12-901, *et seq.* The Court has considered the record from the administrative proceedings, as well as the parties’ legal briefs.¹²

¹ The parties waived oral argument.

² The ROC is appearing as a nominal party in these proceedings.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2006-000335-001 DT

10/09/2007

Factual and Procedural Background

Plaintiff, the holder of a Class B-05 ROC license (No. 179417) was respondent to an administrative disciplinary proceeding before the ROC. The action was initiated by a complaint by homeowners Brandy and Gregory Cummins and arises as a result of the Cummins' pool construction project.

On July 21, 2005, the Cummins filed a complaint with the ROC alleging various violations of A.R.S. §32-1154(A). On October 13, 2005, the Office of Administrative Hearings (OAH) issued a notice of hearing, setting the matter for hearing for Tuesday, December 13, 2005 at the ROC Office in Lake Havasu City, Arizona³. On December 13, 2005, Artistic failed to appear for the hearing. Administrative Law Judge (ALJ) Brian Smith conducted the hearing in Artistic's absence. A day later, on December 14, 2005, James McNamara, Artistic's president and qualifying party, appeared at the ROC office in Lake Havasu City, Arizona, mistakenly believing that the hearing was scheduled for that date. Mr. McNamara miss-calendared the date when he looked at a 2006 calendar instead of a 2005 calendar. Mr. McNamara incorrectly believed that December 13 was a Wednesday versus a Tuesday.

The ROC advised Mr. McNamara that the hearing had already taken place. Mr. McNamara immediately orally requested a new hearing, but was told that he would have to wait until the ALJ issued his recommended decision before filing a written motion for a new hearing. On December 29, 2005, the ALJ made a recommended decision that Artistic's license be revoked. The ALJ considered Artistic's non-appearance without legal or reasonable excuse as "absence of good faith". On February 2, 2006, the ROC adopted with modifications ALJ Smith's recommendation revoking Artistic's license. On March 2, 2006, Artistic filed a petition for rehearing. The Cummins' objected to same. On March 21, 2006, ALJ Smith recommended against granting the petition for rehearing. On April 20, 2006, the ROC adopted ALJ Smith's recommendation denying rehearing.

³ The hearing was held by videoconference.
Docket Code 019

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2006-000335-001 DT

10/09/2007

Legal Analysis

A.R.S. § 12-910(E) delineates the scope of this court's review:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The trial court is vested with broad discretion when deciding a motion to set aside a default judgment, and its ruling will not be overturned on appeal absent a clear abuse of discretion. *Hirsch v. National Van Lines, Inc.*, 136 Ariz. 304, 308, 666 P.2d 49, 53 (1983). The exercise of discretion must be supported "by facts or sound legal policy." *City of Phoenix v. Geyler*, 144 Ariz. 323, 328-29, 697 P.2d 1073, 1078-79 (1985).

In determining whether an agency has abused its discretion by acting in an arbitrary and capricious manner the court reviews the record to determine whether there has been "unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Petrus v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981), quoting *Tucson Public Schools, District 1 of Pima County v. Green*, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972). See also *Baca v. Arizona Dept. of Economic Security*, 191 Ariz. 43, 951 P.2d 1235 (App. 1998). However, an agency's legal interpretations and conclusions are not binding on the court. *Begay v. Arizona Dept. of Economic Security*, 128 Ariz. 407, 626 P.2d 137 (App. 1981); *Carondelet Health Services v. Arizona Health Care Cost Containment System Admin.*, 182 Ariz. 502, 897 P.2d 1388 (1995).

Artistic contends that the ALJ abused his discretion by denying its request for rehearing and that Mr. McNamara's actions amounted to "excusable neglect". Artistic further argues that Mr. McNamara demonstrated his good faith when he appeared for hearing the next day at the ROC office. The Cummins argue that Artistic failed to set valid justification for rehearing or valid grounds for rehearing under A.A.C. R4-9-120. This Court disagrees.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2006-000335-001 DT

10/09/2007

Neglect is excusable when it is such as might be the act of a reasonably prudent person in the same circumstances. *Walker v. Kendig*, 107 Ariz. 510, 489 P.2d 849 (1971). In the context of an attorney's action or inaction, the Arizona cases have found excusable neglect where "the mistake or neglect . . . was the type of clerical error which might be made by a reasonably prudent person who attempted to handle the matter in a prompt and diligent fashion." *City of Phoenix v. Geyler*, *supra*, 144 Ariz. at 332, 697 P.2d at 1082. The rule governing relief from judgment does not require extraordinary vigilance, as inadvertence is also a basis for relief. *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 871 P.2d 698 (App. 1993).

The Court concludes that the calendaring error described herein was the result of inadvertence that a reasonably prudent person, even exercising ordinary vigilance could have committed. Artistic further demonstrated that it had made an inadvertent error by appearing for hearing the very next day, albeit mistakenly. The Court concludes that the ROC abused its discretion in not excusing Artistic's conduct which does not seem unreasonable under these facts.

Refusing to set aside the judgment in these circumstances is harsh, rather than fair and equitable. In such a case, the appellate court can "look over the shoulder" of the trial court and appropriately substitute its judgment for that of the trial court. *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983). When the record reveals circumstances that this Court believes warrants relief, we can overturn the trial court's discretionary ruling. The law prefers resolution of actions on their merits rather than by default, and "any doubts should be resolved in favor of the party seeking to set aside the default judgment." *Hirsch v. National Van Lines, Inc.*, 136 Ariz. 304, 308, 666 P.2d 49, 53 (1983).

Based on the foregoing,

IT IS ORDERED reversing the final decision of the Arizona Registrar of Contractors.

IT IS FURTHER ORDERED that the Registrar of Contractors shall vacate the disciplinary action taken against Artistic's license.

IT IS FURTHER ORDERED remanding this matter to the Registrar of Contractors for further hearing on the merits.